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No. 85-1685

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANTHONY HERBERT,
Petitioner,

v.

BARRY LANDO, MIKE WALLACE,
COLUMBIA BROADCASTING SYSTEM, INC., and
ATLANTIC MONTHLY COMPANY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY BRIEF

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In this public figure libel action, petitioner Anthony Herbert seeks certiorari on two issues: first, whether so-called "subsidiary libels" made with actual malice are actionable; and second, whether a libel action may be based upon the specific defamatory meanings conveyed by a publication as a whole, as distinguished from any individual statements contained in that publication.

The Court of Appeals for the Second Circuit has answered both questions negatively. It concluded that specific defamatory falsehoods—"even those that might be found to have been made with actual malice"—should not be actionable if they are "merely subsidiary" to other

"larger," nonactionable defamations.[1] App. A at 22a-23a [2] It further disallowed petitioner's "overall impact" claim of liability. *Id.* at 12a-15a.

As the Petition demonstrates, both holdings are in error. Defamatory falsehoods made with actual malice are always actionable, regardless of the context in which they appear. Pet. at 13-15 and cases cited therein.[3] And while the Court's rulings to date are less clear regarding the viability *vel non* of petitioner's "overall impact" claim, the existing division of opinion in the lower courts over this important federal question militates in favor of granting review. Pet. at 20-21.

Respondent CBS, *et al.*'s Brief in Opposition [4] dutifully recites that the Court of Appeals decision was correct "in law and logic" and, hence, that review is unwarranted. *See, e.g.*, Resp. Br. at 2; 11. Yet, it pays scant attention to the court's actual *ratio decidendi.* As if acknowledging that there really is no cogent basis for the novel constitutional theories fashioned below, respondents' brief instead constructs an elaborate series of "independent grounds" in support of the court's judgment. Resp. Br. at 10.

Specifically, ten pages of respondents' twenty-eight page opposition are devoted to discussing three defama-

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[1] These "larger" defamations were declared "nonactionable" not because petitioner conceded their truthfulness, which he never did, or because they were non-defamatory, which they were not. Rather they were "nonactionable" in the narrow legal sense that petitioner was unable to establish the "almost impossible level" of *New York Times* malice. *Dun & Bradstreet v. Greenmoss Builders,* —— U.S. ——, 105 S. Ct. 2939, 2952 (1985) (White, J., concurring).

[2] "App. A" citations refer to the Court of Appeals decision which is reproduced in Appendix A to the petition for certiorari at 1a-27a.

[3] "Pet. at ——" citations refer to the petition for writ of certiorari.

[4] Hereafter cited as "Resp. Br. at ——."

tion law defenses—the defamatory construction, "libel-proof" plaintiff, and substantial truth doctrines—that allegedly validate the Second Circuit's decision, even though that decision rests on other grounds. Resp. Br. at 12-21. But the latter two defenses were advanced by respondents below, and soundly rejected.[5] The panel's decision rests squarely on its entirely novel and unprecedented "subsidiary libel" doctrine.[6] And as for the first allegedly "independent" defense, defamatory construction, it is simply inapposite.[7]

When not proffering post-decision rationalizations for the lower court's holding, respondents' brief frequently attempts to diminish the significance of the two defamatory falsehoods which the district court found actionable. Thus these libels are variously described as "minor factual inaccuracies" or "insignificant statements." Resp. Br. at 13; 14. The record, however, is to the contrary. Both lower courts agreed that the effect of these statements was to brand petitioner publicly as a liar. App. A at 22a; App. B at 91a; 103a.[8] It is hardly accurate to

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[5] *See* App. A at 19a-21a wherein the Court of Appeals briefly considers and rejects basing its decision on the incremental harm branch of the libel-proof doctrine stating that a "reasoned and different ground [i.e., the "subsidiary libel" doctrine]" exists for its holding. *See* also App. A at 18a wherein the appellate court, by refusing to contest the district court's findings that the "subsidiary libels" were false and conceivably made with actual malice, perforce recognized that the substantial truth doctrine was inapplicable.

[6] As we pointed out in the petition for certiorari, *no cases* from this or any other court were cited by the Second Circuit to support the creation of its "subsidiary libel" doctrine. Pet. at 16. Respondents did not contest this assertion.

[7] The Second Circuit repeatedly conceded that the statements asserted by petitioner to have been made with actual malice were defamatory. *See, e.g.*, App. A at 22a. ("The first statement . . . was defamatory . . . . The second statement . . . undermines Herbert's credibility . . . .")

[8] "App. B at ——" citations refer to Appendix B to the petition for certiorari which contains the October 10, 1984 United States District Court Opinion below.

characterize such a derogatory charge, aired over a national television network, as being a "minor" assault on one's reputation. Moreover, even if these "inaccuracies" are "minor," in the sense that much more derogatory assertions were made which could not be disproven, this is no reason to disallow petitioner from seeking partial vindication of his tarnished reputation. *See* Appendix to Resp. Br. at 6a. ("[I]f a plaintiff, who denies throughout that he is a liar, proves that two statements branding him a liar were false and malicious he may be compensated for an injury to reputation, even though he cannot prove malice in respect of other statements calling him a liar.")

An additional leitmotiv sounded from the opening page of the argument section of respondents' brief is that the "protracted" nature of this litigation should somehow operate to preclude review. Resp. Br. at 9, 14, 28. However, as this Court is well aware, a significant portion of the "twelve years of litigation" of this action was taken up by respondents' refusal to answer legitimate discovery questions about their state of mind in preparing the publications at issue. *Herbert v. Lando*, 73 F.R.D. 387 (S.D.N.Y. 1977), *rev'd*, 568 F.2d 974 (2d Cir. 1977), *rev'd and remanded*, 441 U.S. 153 (1979). Clearly then, respondents have no basis to complain that this case has been in court for too long. This is particularly true given the obvious disparity in financial resources between respondents and petitioner.

Lastly respondents attempt to conjure up two alleged procedural defects as a means to obviate the need for review. First they assert that petitioner did not preserve his "overall impact" claim for review. Resp. Br. at 22-23. Second, it is alleged that petitioner may not object to the use of the "convincing clarity" standard at the district court level since he "did not raise this issue until after the District Court had rendered its decisions." *Id.* at 26-27.

As regards the first contention, it is undisputed that the overall impact claim was raised before the district court. Moreover respondents concede, as they must, that it was fully considered by that court. Resp. Br. at 23 n.17. *See also* App. C.[9] Even if it were true that this claim was only raised before the district court on reargument, respondents cite no case to support the fundamentally incorrect proposition that a legal issue fully addressed by both the district court and the Court of Appeals has not been preserved for appeal to this Court. Nor can they. Indeed, the entire weight of legal authority is to the contrary. *See generally*, *Neely v. Eby Constr. Co.*, 386 U.S. 317, 330 (1967) and cases cited therein.

The second contention is equally specious. The Court of Appeals not only allowed petitioner to argue that the district court had erred in applying the "clear and convincing" evidence standard to the question of actual malice in evaluating respondents' motion for summary judgment, but it examined that argument in detail. *See* App. A at 8a-9a. No more is needed to raise the issue on certiorari.[10] *See, e.g., Cort v. Ash*, 422 U.S. 66, 73-74 n.6 (1975) (this Court will consider all issues presented to and considered by U.S. Court of Appeals). *Accord, U.S. v. Ortiz*, 422 U.S. 891, 898 (1975); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1969).[11]

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[9] "App. C" refers to Appendix C to the petition for certiorari containing the seventeen page published district court opinion in which petitioner's overall impact claim is thoroughly addressed.

[10] Moreover, should the Court in *Liberty Lobby v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984), *cert. granted*, 105 S. Ct. 2672 (1985), resolve the "clear and convincing" issue in petitioner's favor, this would be sufficient to rebut Respondent Atlantic Monthly's assertion that summary judgment was correctly granted as to it. Opp. Br. of Atlantic Monthly at 3. This is because although petitioner proffered evidence of the Atlantic's actual malice below it was evaluated under the convincing clarity evidentiary standard.

[11] Even granting that petitioner's opposition to respondent's summary judgment motion at the district court level cited the "con-

CONCLUSION

For all the foregoing reasons and those stated in the Petition, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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vincing clarity standard—it was, after all, the accepted law of the Second Circuit, *see, Yiamouyiannis v. Consumers Union*, 619 F.2d 932, 940 (2d Cir. 1980)—respondents again offer no citation to explain their curious estoppel theory. Further given that this Court will, in a matter of weeks, resolve the "clear and convincing" evidence issue in the *Liberty Lobby* case, it would not further the proper administration of justice to allow petitioner's case to lapse on what might ultimately prove to be a spurious constitutional requirement.